

Supreme Court Upholds University of Texas Affirmative Action Admissions Policy

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The Supreme Court has rejected a challenge under the Equal Protection Clause to the University of Texas at Austin's race-conscious admissions program in *Fisher v. University of Texas at Austin* ("Fisher II"). This closely-watched decision upholds UT's complex freshman admissions policy, which was in its second round of litigation before the nation's highest court. Justice Kennedy wrote for the majority in a 4-3 decision, handing a victory to supporters of affirmative action in higher education. Justice Alito, joined by Chief Justice Roberts and Justice Thomas, wrote a strongly-worded dissent. (Justice Kagan was recused because of her prior work on the case as Solicitor General.)

The *Fisher II* majority emphasized the fact-specific nature of the UT admissions policy. Under that policy, up to 75% of the UT freshman class is admitted using the so-called "Top Ten Percent Plan," under which UT guarantees admission to Texas high school students who graduate in the top 10 percent of the class. The remainder of the incoming class is admitted through a holistic review that combines an applicant's "Academic Index," consisting of SAT score and high school grades, with the applicant's "Personal Achievement Index," which considers a number of other factors, including race. Petitioner Abigail Fisher did not graduate in the top 10 percent of her high school class, and she therefore did not challenge the Top Ten Percent Plan aspect of the policy. Instead, Fisher's equal protection challenge concerned the holistic review portion of the admissions policy, under which an applicant's race is considered as one of several factors making up the Personal Achievement Index score.

In rejecting Fisher's challenge, the Court articulated three controlling principles. First, the use of race must withstand strict scrutiny. Second, if the university successfully articulates "a reasoned, principled explanation" for its policy, its conclusion that diversity serves its educational goals should be given judicial deference. Third, the university nonetheless bears the burden of proving that "race-neutral alternatives that are both available and workable do not suffice."

The Court then examined the specific facts of the case. It concluded, among other things, that the record established that "the University articulated concrete and precise goals" that mirrored the compelling interest the Court had previously approved, including the destruction of stereotypes, the promotion of cross-racial understanding, and the preparation of students for a diverse workforce. It noted that UT had conducted months of study before adopting its policy, and that its numerous prior race-neutral efforts had been unsuccessful.

Although the decision is a victory for affirmative action, the *Fisher II* majority opinion appears to be a compromise decision with many caveats designed to limit its broader applicability. For example, the Court noted that Fisher's failure to challenge the Top Ten Percent Plan complicated its analysis because there was no information in the record about how the students admitted through the Top Ten Percent Plan differ in their contribution to diversity from those admitted under holistic review. The Court indicated that because of this limitation, the opinion's value for prospective guidance may be limited. The Court similarly cabined its ruling by stating that "[t]he Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement" and stated that UT has an "ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policy."

Foley Hoag submitted a brief on behalf of its client the Asian American Legal Defense and Education Fund (AALDEF), 21 Asian American education and youth-serving groups, and 44 higher education faculty and officials urging the Court to uphold the UT policy.

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